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No. . . .
IN THE

Supreme Court of the United States

October Term, 1980

GILBERT FRANK LOPEZ,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal, State of California, Second Appellate District, Division Two.

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QUESTIONS PRESENTED.

1. Absent consent or exigent circumstances, are the Fourth and Fourteenth Amendments violated by the warrantless searches of commercial property conducted for the purpose of seizing evidence of crime?

2. Are the Fourth and Fourteenth Amendments violated by the same searches conducted pursuant to an administrative warrant based on less than probable cause?

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IN THE

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GILBERT FRANK LOPEZ,

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STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

Petitioner, GILBERT FRANK LOPEZ, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two (2d Crim. No. 37347), entered on March 6, 1981, which affirmed the conviction and sentence of the Los Angeles Superior Court.

OPINIONS BELOW.

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two, is reproduced in Appendix A. The order of the Supreme Court of the State of California dated May 8, 1981 denying a petition for hearing, with two justices dissenting, is reproduced in Appendix B.

JURISDICTION.

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code section 1257(3), since a right is claimed under the Fourth and Fourteenth Amendments to the United States Constitution.

This petition is filed within sixty days of the order of the Supreme Court of the State of California, dated May 8, 1981, denying a hearing on petitioner's judgment of conviction affirmed by the Court of Appeal, of the State of California, Second Appellate District, Division Two, by opinion dated March 6, 1981. (Rules of the Supreme Court of the United States, Rule 20.1)

CONSTITUTIONAL PROVISION AT ISSUE.

Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE.

The facts presented here are undisputed in the record unless otherwise indicated.[1]

Police Investigation Leading to Commercial Searches.

Officer Robin R. Ririe was a police officer with the burglary-auto theft section of the Los Angeles Police Department (P.H. 197). In February, 1978, Officer Ririe was informed by Los Angeles Police Sergeant Biller of the Hollywood Division, that "numerous cars were going into

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[1]The following designations are used in this Petition: P.H. (Reporter's Transcript of Preliminary Hearing); R.T. (Reporter's Transcript on Appeal); C.T. (Clerk's Transcript on Appeal).

Daytona that appeared to be complete cars, that is, without damage, and that they never came out again (P.H. 198).[2] This was the first occasion that Officer Ririe had heard a reference to the Daytona Auto Body business (P.H. 201).

A second reference occurred during an unrelated investigation of Ernest Stradmann. In May 1978, Officer Ririe conversed with Ron D. Brodigan, manager of the Color Glow paint store. Mr. Brodigan informed Officer Ririe that he was doing business with Sol Mizrahri, part owner of Culver City Auto Dismantlers. Mr. Brodigan would paint vehicles imported and refurbished for sale by Mr. Mizrahri (R.T. 39-42). On May 19, 1978, Officer Ririe attended a meeting of the Western States Auto Theft Investigators and presented the information obtained from Mr. Brodigan (R.T. 43).

On May 22, 1978, Officer Ririe received a telephone call from Lou Chess, an owner of Culver City Auto Dismantlers. Mr. Chess explained that he had terminated a one-year business association with Mr. Mizrahri. During the association, Mr. Chess would refurbish vehicles brought and later sold by Mr. Mizrahri (R.T. 45-46). Concerned with the "quality" of the vehicles (R.T. 52), Mr. Chess asked Mr. Mizrahri to "take his business somewhere else" (R.T. 46). According to Mr. Chess, Mr. Mizrahri took his business to Daytona Auto Body, Inc. (R.T. 46). With the receipt of this information, Officer Ririe conducted no further investigation of Mr. Mizrahri (R.T. 49).

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[2]The reference to Daytona is to Daytona Auto Body, Inc. At the time of the July 27, 1978 search of the business premises of Daytona, the police learned that the petitioner was the apparent proprietor of the business. There is no indication in the record whether the police had such knowledge prior to the search.

By May 22, 1978, Officer Ririe had formed the opinion that "they were dealing in stolen and switched cars at Daytona Auto Body Shop" (R.T. 52).

On July 26, 1978, Officer Ririe conversed with Bill Johnson, an investigator with Insurance Crime Prevention Associates (R.T. 52). The testimony is conflicting as to the content of that conversation. At the preliminary hearing, Officer Ririe testified that Mr. Johnson informed him of insurance fraud investigations conducted of Daytona Auto Body, Inc. (P.H. 198). However, at the suppression hearing, Officer Ririe testified that Mr. Johnson provided no information; he simply inquired "when we were going to go down and look for stolen cars" (R.T. 59).

Based on the foregoing facts, on July 27, 1978, the police conducted a warrantless search of the petitioner's business premises, Daytona Auto Body, Inc., to seize evidence of crime.

Search of Commercial Property.

On July 27, 1978, between 9:30 and 9:45 A.M., Officer Ririe arrived at Daytona Auto Body, Inc. The purpose of his visit was to "inspect vehicles, looking for altered or stolen vehicles (P.H. 198-199)." Officer Ririe had not secured a search warrant (P.H. 201).

Daytona occupied the third floor and roof of a three-story building (P.H. 199). When Officer Ririe reached the third floor, he was greeted by petitioner. The officer identified himself as a policeman. He informer petitioner of his intent to conduct a "business inspection" of the premises to "look for stolen or altered vehicles." Officer Ririe explained that the police had authority to conduct the inspection under California Vehicle Code Section 2805 (P.H. 199-203; R.T. 60).

Petitioner responded, according to Officer Ririe, "there is no problem here. My business is open." Officer Ririe requested to examine the paperwork on all vehicles located on the premises. Petitioner consented and directed the officer to his office (P.H. 200).

At this time other Los Angeles Police Department officers arrived on the premises (P.H. 200). Over the course of the next five to six hours, the officers searched "every vehicle" located on petitioner's property (P.H. 218). By examining identification numbers on the vehicles, they determined that several of them were stolen (P.H. 211-215). At conclusion of the search, the police impounded vehicles, parts of vehicles and paperwork seized from the premises of the Daytona Auto Body business (P.H. 204).

Daytona Auto Body performed repairs and body work on automobiles (P.H. 203). The business was also described as "a storage [for] parts for dismantled vehicles (P.H. 207)." During the search, the officers observed approximately thirty to thirty-five vehicles on the premises. Some of the vehicles were freshly painted (P.H. 207-211).

On August 4, 1978, Officer Mark Ford, who had participated in the July 27, 1978 search, arrived at Daytona. He sought to execute an arrest warrant on petitioner. Employees of Daytona informed the officer that petitioner was not present on the premises (P.H. 225). Officer Ford proceeded to conduct another search of the premises, resulting in the impounding of two vehicles (P.H. 229). The search was not conducted pursuant to a warrant, but under authority of California Vehicle Code Section 2805 (P.H. 230).

Proceedings in the Trial Court.

In a fourteen count information, the petitioner was charged with grand theft of an automobile, receiving stolen property, grand theft and insurance fraud.

On November 14 and 17, 1978, at the conclusion of the preliminary hearing held in municipal court, the petitioner objected to the introduction of all evidence seized pursuant to the searches of his business premises. The court overruled the objection and bound the cause over for proceedings in the superior court (P.H. 247-248).

The petitioner filed a motion to suppress all evidence seized pursuant to the July 27 and August 4, 1978 searches. The basis for the motion was the unconstitutionality of California Vehicle Code Section 2805 which authorizes warrantless searches in violation of the Fourth Amendment (C.T. 286-304).[3] On March 9, 1979, the motion was submitted after argument pursuant to stipulation that the transcript of the preliminary hearing could be considered by the trial court in ruling on the motion (C.T. 282).

The ruling was continued to March 14, 1979 when the prosecution moved to reopen and present additional evidence. Over petitioner's objection, the additional testimony was introduced at hearing on March 16, 1979 (C.T. 283). On that date, the court *granted* petitioner's suppression motion "to the extent that Vehicle Code Section 2805, as it pertains to this case, is unconstitutional (R.T. 64; C.T.

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[3]At the time of the searches, Vehicle Code Section 2805 read in pertinent part:

> "(a) For the purpose of locating stolen vehicles, a member of the California Highway Patrol may inspect any vehicle of a type required to be registered under this code on a highway or in any public garage, repair shop, parking lot, new or used car lot, automobile dismantler's lot, vehicle shredding facility, vehicle leasing or rental lot, vehicle equipment rental yard, vehicle salvage pool, or other similar establishment, and may inspect the title or registration of vehicles in order to establish the rightful ownership or possession of the vehicle . . . .
>
> (c) Whenever possible, inspections conducted pursuant to subdivision (a) . . . . shall be conducted at a time and in a manner as to minimize any interference with, or delay of, business operations."

305)." The court continued the cause to March 29, 1979 on the issue of consent (R.T. 67-68).

At the commencement of the March 29, 1979 hearing, the court announced its decision to reverse its ruling. It *denied* petitioner's motion to suppress evidence, holding that California Vehicle Code Section 2805 is not unconstitutional as applied in the instant case (R.T. 75). The cause was continued on several occasions to permit preparation of transcripts for purposes of filing a Writ of Mandate to the Court of Appeal (C.T. 306-307). The Writ was not filed.

On February 1, 1980, the petitioner withdrew his plea of not guilty and entered a plea of nolo contendere to two counts of receiving stolen property and two counts of grand theft, all felonies (C.T. 313). The petitioner was granted probation for a period of three years on condition, among others, that he spend the first 280 days in the county jail. The prosecution dismissed the remaining counts in the information (C.T. 314-315).

Proceedings in the Appellate Courts.

On March 6, 1981, the Court of Appeal, Second Appellate District, Division Two, reaching the merits of the Fourth Amendment contention, affirmed the conviction below. The Court explained that business premises may be searched under Vehicle Code Section 2805 "under reasonable circumstances, within constitutional limitations." It concluded that both searches of petitioner's business were proper, in that the "totality of the information available to the police," prior to the searches, "raised the probability" of the presence of criminal activity at Daytona Auto Body (Opinion at p. A-6).

The Court of Appeal also cited California Vehicle Code Section 320[4] which subjects auto dismantlers to warrantless inspections during normal business hours of vehicles and records on their premises. Concluding that appellant was an auto dismantler, the Court decided that the searches of petitioner's business were also proper under Section 320.

After the Court of Appeal denied a petition for rehearing, the petitioner filed, on April 15, 1981, a petition for hearing before the California Supreme Court, raising the Fourth Amendment contention.

On May 8, 1981, over the dissent of Chief Justice Bird and Justice Mosk, the California Supreme Court voted to deny the petition for hearing.

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[4]At the time of the searches, Vehicle Code Section 320 read in pertinent part:

" 'Established place of business' is a place actually occupied either continuously or at regular periods by:

. . . (b) An automobile dismantler where the books and records pertinent to the type of business being conducted are kept. The place of business shall have an office and a dismantling area located in a zone properly zoned for that purpose by the city, county or city and county. A place of business of an automobile dismantler which qualified as an 'established place of business' before the enactment of amendments to this section at the 1970 Regular Session of the Legislature shall be deemed to be an 'established place of business' as defined in the section. . . .

The place of business shall be open to inspection of the premises, pertinent records and vehicles by any peace officer during business hours."

REASONS FOR GRANTING THE WRIT.

I.

Although Businesses Are Inspected Daily, This Court Has Not Yet Articulated Whether a Search of Commercial Property to Seize Evidence of Crime May Be Conducted Without a Warrant.

American businesses are subjected to administrative inspections by federal, state and local authorities on a daily basis. These inspections are generally intended to ensure compliance with statutes and administrative regulations, having as their purpose, protection of the employees or customers of the businesses.[5]

There are other business inspections conducted for the sole purpose of seizing contraband or evidence of crime. These inspections may be conducted under the guise of an administrative search[6] or pursuant to statutory authorization as in the instant case.

Most recently, this Court decided *Donovan v. Dewey*, ... U.S. ...., No. 80-901, 81 Daily Law Journal D.A.R. 1890 (U.S. Sup. Ct., June 17, 1981). In that case, noting that the Fourth Amendment prohibits only *unreasonable* intrusions onto commercial property, the Court delineated

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[5]The types of businesses regularly subjected to government inspection include: taverns, liquor stores, junk dealers, pharmacies, hospitals, funeral parlors, massage parlors, race tracks, coal mines, producers and distributors of food products and auto repair shops similar to petitioner's business. See La Fave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, Vol. 3, §10.2, pp. 211-212, for cases exemplifying inspections of each of the businesses referenced above.

[6]*Michigan v. Tyler*, 436 U.S. 499 (1978) (Evidence of crime seized by police arson investigator from furniture store during search to determine cause of fire); *United States v. Lawson*, 502 F.Supp. 158 (D. Mary. 1980) (Search of pharmacy conducted by DEA agents pursuant to an administrative warrant for purpose of obtaining evidence to be used in criminal prosecution).

the circumstances under which an administrative inspection may properly be conducted without a warrant.

Addressing the Fourth Amendment requirements for a business search intended to seize contraband or evidence of crime, the Court commented in Footnote 6:

> "Absent consent or exigent circumstances, a private home may not be entered to conduct a search or effect an arrest without a warrant (citations omitted). Of course, *these same restrictions pertain when commercial property is searched for contraband or evidence of crime.*" *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352-359 (1977) (Emphasis added).

Id. at 1890. Mr. Justice Rehnquist, in his concurring opinion, articulated further:

> "But I have no doubt that had Congress enacted a criminal statute similar to that involved here — authorizing for example unannounced warrantless searches of property reasonably thought to house unlawful drug activity — the warrantless search would be struck down under our existing Fourth Amendment line of decisions. This Court would invalidate the search despite the fact that Congress has a strong interest in regulating and preventing drug related crime and has in fact pervasively regulated such crime for a longer period of time than it has regulated mining."

Id. at 1891.

The issue emerges whether, absent consent or exigent circumstances, a warrantless search of commercial property

for the purpose of seizing evidence of crime is *per se* unconstitutional.[7]

This Court has recently clarified the proposition that, absent consent or exigent circumstances, a *private home* may not be entered to conduct a search or effect an arrest without a warrant based on probable cause. *Stegald v. United States*, ... U.S. .... (1981); *Payton v. New York*, 445 U.S. 573 (1980). Despite the reference in Footnote 6 of the majority opinion, and Mr. Justice Rehnquist's concurring opinion, in *Donovan v. Dewey*, this same proposition as it pertains to entry on commercial property to seize evidence of crime remains muddled.

The confusion may rest with the failure to distinguish these so-called criminal commercial searches from the more typical administrative commercial searches which, in some cases, carry an exception to the warrant requirement.

In *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), this Court held that the warrantless entry into a corporate office to seize books and records was violative of the Fourth Amendment. In that case, Internal Revenue Service agents had entered the premises pursuant to jeopardy

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[7]In the instant case, the issue of consent was not litigated in the trial court, nor addressed by the Court of Appeal. The searches were justified under statutory authority. In any event, Officer Ririe was admitted on the premises only after informing petitioner of his intent and authority to conduct a warrantless search; this is not consent but merely an acquiescence to a claim of lawful authority. *United States v. Kramer Grocery Co.*, 418 F.2d 987 (8th Cir. 1969); *United States v. Enserro*, 401 F.Supp. 460 (W.D.N.Y. 1976); see *Bumper v. North Carolina*, 391 U.S. 543 (1968) (Police claim of possession of search warrant vitiated consent). Moreover, the absence of exigency is apparent from the fact that Officer Ririe had commenced his investigation in February, 1978 (some five months prior to the searches) and formed an opinion as to the existence of criminal culpability on May 22, 1978 (more than two months prior to the searches). Therefore, this Court would have a sufficient basis to conclude that neither the consent nor exigency exception could justify the warrantless searches conducted of petitioner's business.

assessments for tax deficiencies of a taxpayer. The corporation then sued the government in a civil action wherein the Fourth Amendment issues became determinative.

In explaining its holding, the Court stated that the intrusion onto the commercial property to enforce the tax laws could not be justified under any exception to the warrant requirement. However, the Court also recognized that "a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissable in a purely private context." *Id.* at 353. After citing *United States v. Biswell*, 406 U.S. 311 (1972) (warrantless search of locked storeroom during business hours pursuant to inspection authorized by federal statutory scheme was constitutional), the Court surmised that the search conducted of the corporate premises may have been justified if based "on the nature of its business, its license or any regulation of its activities." *Id.* at 354. Consequently, the impression was left that a warrantless search conducted to enforce criminal laws may be justified if based on the peculiarities of the particular business searched.

A similar impression was created by language presented in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1977). That case involved the constitutionality of a provision of the Federal Occupation Safety and Health Act which permitted warrantless inspections of businesses. In upholding the necessity of a warrant, the Court explained that a warrant "would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to a neutral plan containing specific neutral criteria." *Id.* at 323.

The impression of the possibility of an administrative exception to the warrant requirement for criminal commercial searches was raised in the Court's distinguishing precedent. The Court stated:

> "If the government intrudes on a person's property, the privacy interest suffers, whether the government's motivation is to investigate violation of criminal laws or breaches of other statutory or regulatory standards . . .
>
> The Secretary urges that an exception from the search warrant requirement has been recognized for 'pervasively regulated business[es]', *United States v. Biswell* (citation omitted), and for 'closely regulated' industries 'long subject to close supervision and inspection.' *Colonnade Catering Corp. v. United States*, (citations omitted). These cases are indeed exceptions . . . Certain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise." (Emphasis added).

Id. at 312-313.

The question remained by implication whether a warrantless search of pervasively regulated industries such as liquor (*Colonnade*) or firearms (*Biswell*), for the sole purpose of seizing evidence of crime, was unconstitutional?

Upon initial glance, it would appear that the question was resolved by this Court in *Michigan v. Tyler*, 436 U.S. 499 (1978). In that case, officials investigating the cause of a fire in a furniture store conducted a series of warrantless searches and seizures. Of interest here was the entry of the store by a state police arson investigator days after the fire had been extinguished. During the entry, the store was searched and evidence seized and later introduced in a criminal prosecution for conspiracy to burn real property.

In considering the constitutionality of the series of searches and seizures, the Court, in part citing from the opinion of the Michigan Supreme Court, articulated:

> "If the authorities are seeking evidence to be used in criminal prosecution, the usual standard [of probable cause] will apply (citations omitted). Since all the entries in this case were 'without proper consent' and were not 'authorized by a valid search warrant' each one is illegal unless it falls within one of the 'certain carefully defined classes of cases' for which warrants are not mandatory . . ."

Id. at 508-509. The Court concluded that the belated police intrusions were sufficiently detached from the initial exigency of the fire, that the warrant exception was not present.

However, the Court announced its holding in these words:

> ". . . Additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing *administrative searches*. See *Camara*, 387 U.S. at 534-539 . . .; *See v. Seattle*, 387 U.S. at 544-545 . . .; *Marshall v. Barlow's Inc.*, ante, at 320-321 . . . Evidence of arson discovered in the course of such investigations is admissible at trial, but if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution, they *may obtain a warrant* only upon a traditional showing of probable cause applicable to searches for evidence of crime . . ." (Emphasis added).

Id. at 511-512.

For present purposes, the Court's holding appears to beg the question. The Court indicated that a warrant *may* be obtained only upon probable cause. The question remains, however, whether a warrant *must* be obtained to search certain business premises to seize evidence for possible prosecution.

Finally, Mr. Justice White's concurring opinion in *Dunaway v. New York*, 442 U.S. 200 (1979), further emphasizes the problem. Mr. Justice White, author of *Marshall v. Bar-*

low's Inc., categorized that opinion and the *Michigan v. Tyler* decision as examples that,

> "the key principle of the Fourth Amendment is reasonableness — the balancing of competing interests."

Id. at 219. This same balancing analysis was again recently adopted by this Court in *Donovan v. Dewey* in the context of an administrative search.

Is this Court pronouncing that, absent consent or exigent circumstances, the constitutionality of a warrantless search of commercial property for purposes of seizing evidence of crime is to be determined by a balancing test, the key to which is the reasonableness of the search? Or does Footnote 6 in the *Donovan* decision mean that such a search is *per se* unconstitutional, as is a similar search of a private home? If the latter is the correct reading of the law, this Court should so state in unambiguous terms, so that the statute (and similar statutes in other states) justifying the search of petitioner's business may be forever removed from the books.

II.

The Court of Appeal's Decision Is a Study of How Lower Courts Erroneously Apply the Administrative and Automobile Exceptions to the Warrant Requirement to Justify Warrantless Police Searches of Vehicles Located on Commercial Property.

The Court of Appeal's decision exemplifies how muddled the waters can become. Recognizing that a search of an historically regulated business was conducted, the Court relied on the adminstrative exception to the warrant requirement. Also, recognizing that a vehicle search was conducted, the Court relied on the automobile exception to the warrant requirement. The fact that the search was conducted of vehicles located on commercial property for the purpose

of seizing evidence of crime apparently was of no import to the Court of Appeal. This Court is now urged to pronounce that the search of petitioner's business falls under neither exception to the warrant requirement, and the absence of a warrant defeats the constitutionality of the search.

The Court of Appeal appears to rely on two grounds in rejecting the petitioner's attack on the constitutionality of the searches. First, Vehicle Code Section 2805 authorizes a warrantless search based on the "probability" of criminal conduct made "under reasonable circumstances, within constitutional limitations." Second, Vehicle Code Section 320 authorizes a warrantless search during normal business hours of an auto dismantling shop, the purpose of which is "to eliminate theft of cars and the profit associated with the illegal activity." (Opinion at pages 6-7).

In addressing the constitutionality of Section 2805, the Court first relies on the automobile exception. The Court cites *People v. Grubb*, 63 Cal.2d 614, 618 (1965), for its conclusion that "[c]ertainly, the totality of information available to Investigator Ririe prior to the inspection 'raised the probability' that Daytona Auto Body was engaged in the business of stolen cars." In *Grubb*, the California Supreme Court upheld the police entry of an automobile without a warrant to investigate the title and registration. The entry was made after the police had found an abandoned automobile parked on the wrong side of the road, creating a traffic hazard, and having no registration slip visible through the window. The Court sustained the warrantless entry only upon the "extraordinary and exceptional circumstances" of that case; noting the constitutional rule requiring a search warrant. The Court explained that to require the officers to secure a warrant under such circumstances would "abort their efforts to protect the safety of the highways." *Id.* at 618-619.

The Court of Appeal's reliance on *Grubb* to justify the search of petitioner's business is sorely misplaced. *Grubb* relied on the automobile exception to the warrant requirement; that exception is wholly inapposite here. The police officers did not search petitioner's automobile on the open highway; rather, they searched petitioner's commercial property on which were found automobiles. The distinction is critical. Surely, a police officer who stops a vehicle on the highway may, with probable cause, conduct a warrantless search of its interior; however, assuming the absence of hot pursuit, the warrantless police search of the same vehicle located in the locked garage of a residence would be unconstitutional. Furthermore, the Supreme Court in *Grubb* emphasized the exigency of the circumstances surrounding the search; no exigency was present here, as Officer Ririe had formed the opinion of the presence of crime on petitioner's premises more than two months prior to the searches.

After citing *Grubb*, the Court of Appeal relied on *People v. Burnett*, 107 Cal.App.3d 795, 800 (1980), and *Jackson v. Superior Court*, 74 Cal.App.3d 361, 367 (1977), for the proposition that Section 2805 authorizes a warrantless search "under reasonable circumstances" for the purpose of investigating a vehicle's title or registration. In *Burnett*, the Court upheld a search of the identification number on a vehicle being towed on a public street; explaining that the initial stop of the tow truck was for a traffic offense committed in the officer's presence, and the ensuing detention emanated from a reasonable and escalating suspicion that the vehicle was stolen. In *Jackson*, the Court suppressed a gun seized under the front seat of the defendant's vehicle stopped on an open highway. Recognizing that Section 2805 authorizes police entry of a vehicle to investigate title and registration, the Court emphasized that such entry is limited

to "urgent circumstances [presenting] probable cause." 74 Cal.App.3d, *supra*, at 368. It is noteworthy, that the Court rejected *People v. Grubb* as support for the prosecution's position that the warrantless search of the vehicle was constitutional under Section 2805. *Id.* at 368.

In the instant case, the Court of Appeal's reliance on *Burnett* and *Jackson* represents a serious misapplication of the law. *Jackson's* holding suppressing the evidence lends no support for the Court of Appeal's decision. *Burnett* involved a detention of a vehicle on a public street based on probable cause. The search of petitioner's business was conducted on private property, without probable cause (only "probability") and without the exigency justifying the automobile exception to the warrant requirement. The Court's reliance on *Jackson* further emphasizes the confusion derived from applying the automobile exception to a search of commercial property housing automobiles. From such confusion emanates a fundamental rejection of the Fourth Amendment's warrant requirement.

The second ground for the Court of Appeal's decision is Vehicle Code Section 320 and *People v. Woolsey*, 90 Cal.App.3d 994 (1979), quoted at length. The *Woolsey* reasoning represents a misplaced reliance on the administrative exception to the warrant requirement in justifying a search of commercial property to seize evidence of crime.

In *Woolsey*, a defendant was properly detained at the police garage for vehicle violations. An officer requested consent to search his auto dismantler business under Section 2805, noting that the failure to so consent subjected him to arrest. The purpose of the search was to seize evidence of crime. The defendant took the officers to his business where they observed vehicles dismantled in the front yard. The defendant was arrested for receipt of stolen property, and subsequently convicted.

On appeal, the defendant attacked the constitutionality of Section 2805. In rejecting the contention, the Court concluded that an auto dismantler relinquishes his reasonable expectation of privacy, thereby permitting warrantless searches of his business premises. As the Court stated, "where the commercial activity, such as the liquor industry (*Colonnade*) or firearms (*Biswell*) has a history of government involvement, the businessman relinquishes his reasonable expectation of privacy (*Marshall v. Barlow's Inc.*, 436 U.S. 307 . . .)." 90 Cal.App.3d, *supra*, at 1002. In demonstrating that auto dismantlers are subject to a history of government regulation, the Court explained that the purpose of Section 2805 "to eliminate trafficking in stolen cars and the illegal interchange of stolen auto parts, has been stated expressly in every amendment to the statute over the last 45 years." *Id.* at 1002. The Court further noted that Vehicle Code Sections 10656 and 320 require that the vehicles and records of auto dismantlers be open for regular government inspection.

In adopting the *Woolsey* reasoning, the Court of Appeal justified the warrantless search of petitioner's business under the administrative exception enunciated in *Biswell* and *Colonnade*. The Court made no distinction between the inspection of a business to determine compliance with administrative regulations and the police search of a business to seize evidence of crime. Upon its failure to so distinguish lies the folly of the Court's holding.

III.

Both Federal and State Courts Struggle With the Question Whether a Police Search of Commercial Property, With or Without an Administrative Warrant, to Seize Evidence of Crime, May Be Based on Less Than Probable Cause.

Whether this Court applies a per se warrant requirement or a balancing test of reasonableness to a commercial search conducted to seize evidence of crime, it must resolve

whether that search may ever be conducted on less than traditional probable cause.

If such a search is to be construed in terms of the traditional police search for incriminating evidence, the answer is clearly no. The problem arises, however, when courts construe the search in terms of standards pertaining to administrative searches.

The point is well illustrated by the case of *New Mexico v. Galio*, 587 P.2d 44 (1979). The facts are remarkably similar to the instant case. Pursuant to a state statute almost identical to Section 2805, the police conducted a warrantless search of the defendant's auto dismantler shop to seize evidence of crime. The constitutionality of the statute authorizing the search was addressed on appeal. The Court held the statute unconstitutional on the ground that a warrantless search was unreasonable under standards set forth in *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978). Thus, on the question of warrant, the New Mexico Appellate Court adopted a position in opposition to the California Court of Appeal's decision. (But see, *Indiana v. Tindell*, 399 N.E.2d 746 (1980) (warrantless inspection of auto dealer's records permissible, as it "concerns the highly regulated motor vehicle industry).")

However, of significance here is the New Mexico Court's reasoning that the same search based on an "administrative warrant" obtained on less than probable cause would be constitutional. The Court specifically noted that it was not concerned with "probable cause to search." *Id.* at 45. In addressing the grounds for issuance of an administrative warrant, the Court cited *Marshall v. Barlow's Inc.*, 436 U.S. 307, 320-321:

> "Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a

> warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' " *Camara v. Municipal Court*, 387 U.S. at 538 . . .

New Mexico v. Galio, supra, 587 P.2d at 46.

Thus, the New Mexico Appellate Court, like the California Court of Appeal, construed the business search, not in terms of the traditional police search, but rather in terms of an administrative search. So construed, the Court determined that probable cause would not be required to justify a business search to seize evidence of crime. Would then the search of petitioner's business have been constitutional had the search been conducted pursuant to a warrant based on "probability" or other standard less than probable cause? The answer demands clarification.

Construing a police search as an administrative search has far-reaching implications. Where an administrative warrant is secured, "probable cause in the criminal sense is not required." *Marshall v. Barlow's Inc.*, 436 U.S. 307, 329 (1978); *Camara v. Municipal Court*, 387 U.S. 538 (1967). Based on this reasoning, some federal courts have upheld business searches for evidence of crime conducted pursuant to an "administrative warrant" secured under a federal regulatory statute.

United States v. Prendergast, 585 F.2d 69 (3rd Cir. 1978) is a case in point. In that case, an agent of the Drug Enforcement Administration secured an "administrative search warrant" pursuant to 21 U.S.C. §880(d) to search the defendant's pharmacy for evidence of crime. The defendant moved to suppress the seized evidence on the ground that the search was based on less than traditional probable cause. In rejecting the argument, the Court stated:

> "Probable cause in the criminal sense is not required to support the issuance of an administrative warrant [citing Marshall v. Barlow's]. The fact that appellant's pharmacy had never before been inspected to insure compliance with compulsory record keeping requirements is a circumstance that alone is sufficient to justify an administrative warrant . . . ."

Id. at 70. So, although the acknowledged purpose of the search was to seize incriminating evidence (not to insure compliance with record keeping), the Court upheld the issuance of a warrant on less than probable cause. *See also United States v. Goldfine*, 538 F.2d 815, 818-819 (9th Cir. 1976); *United States v. Blanchard*, 495 F.2d 1329 (1st Cir. 1974).

A contrasting position was recently pronounced in *United States v. Lawson*, 502 F. Supp. 158 (D. Md. 1980). *Lawson* involved issuance of the same administrative warrant involved in *Prendergast*. A DEA agent secured an administrative warrant pursuant to 21 U.S.C. §880 to search Lawson's pharmacy to seize evidence of crime.

In holding the search violative of the Fourth Amendment, the court explained:

> "A lower standard of probable cause is constitutionally permissible in the administrative inspection context because the intrusion into an individual's privacy is less than that in the criminal context, and is outweighed by the public's interest in the regulatory program. *Zurcher v. Stanford Daily*, 436 U.S. 547, 554-56, 98 S.Ct. 1970, 1975-77, 56 L.Ed.2d 525 (1978); *Marshall v. Barlow's, Inc.*, 436 U.S. at 320-21, 98 S.Ct. at 1824-25; *Camara v. Municipal Court*, 387 U.S. at 534-35, 87 S.Ct. at 1733-34. But once the purpose behind the search shifts from administrative compliance to a quest for evidence to be used in a criminal prosecution, the government may constitutionally enter

> the premises only upon securing a warrant supported by full probable cause. *Michigan v. Tyler*, 436 U.S. 499, 508, 512, 98 S.Ct. 1942, 1949, 1951, 56 L.Ed. 2d 486 (1978)."

Id. at 165. Thus, *Lawson* and *Prendergast* stand at odds.

Courts that are willing to uphold searches based on less than probable cause, if conducted pursuant to a valid administrative warrant, may have hesitancy in upholding such searches made without a warrant. This Court has held that warrantless searches of certain industries (*United States v. Biswell*, 406 U.S. 311 (1972) (firearms); *Colonade Catering Corp. v. United States*, 397 U.S. 73 (1970) (liquor)), or made pursuant to certain regulatory schemes (*Donovan v. Dewey*, ... U.S. ...., No. 80-901, 81 Daily Journal D.A.R. 1890 (U.S. Supp. Ct., decided June 17, 1981)) are "reasonable" under the Fourth Amendment, and as enunciated in *Marshall v. Barlow's*, such warrantless searches may rightfully be conducted on less than probable cause.

Would then a warrantless search of a liquor store or firearms dealer to seize evidence of criminal violations be "reasonable" if based on less than probable cause? Because such searches would be made without the prior scrutiny of a "detached and neutral magistrate", the probable cause question becomes more in need of resolution than where the administrative warrant prefaces the search.[8]

IV.
Conclusions.

Perhaps no principle is more fundamental to this Court's Fourth Amendment decisions than the requirement that a warrant preface a search of private property conducted to

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[8]See LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, Vol. 3, §10.2, pp. 226-230 (1978).

seize evidence of crime. Yet, when such searches are conducted of commercial property, too often, the warrant requirement gives way to the exception carved out for certain administrative searches.

Accordingly, when lower courts examine the constitutionality of the police search of a business to seize evidence of crime, they routinely follow this misplaced scenario: If the business searched is part of an industry with a history of pervasive government regulation, the police failure to secure a warrant does not render the search unconstitutional. Or, if the search was conducted pursuant to an administrative warrant, the absence of probable cause does not render the warrant defective, since probable cause is not required for an administrative search. The lingering problem with the scenario is its failure to see the search for what it is. A search conducted to seize evidence of crime is a police search guided by the warrant and probable cause requirements of the Fourth Amendment. Nothing more, nothing less.

This Court is now summoned to eliminate the confusion. Although opinions of this Court have touched upon the issue, apparently, the message is not being received below. Both state and federal courts labor under the misguided scenario.

Only this Court's full articulation of the issue can set free the businessman routinely subjected to unannounced police searches of his property without a warrant and based on less than probable cause. The time has come.

For the foregoing reasons, a Writ of Certiorari should be granted.

Dated: July 7, 1981.

Respectfully submitted,

JAY L. LICHTMAN,
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SAUL J. BERNARD,
Attorneys for Petitioner.

APPENDIX A.
Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

People of the State of California, Plaintiff and Respondent, vs. Gilbert Frank Lopez, Defendant and Respondent. 2d Crim. No. 37347 (Super. Ct. No. A345494 and A343498.)

Filed: March 6, 1981.

APPEAL from a judgment of the Superior Court of Los Angeles County. Betty Jo Sheldon, Judge. Affirmed.

Stephen Bernard, for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General—Criminal Division, S. Clark Moore, Assistant Attorney General, Robert F. Katz and Frederick Grab, Deputy Attorneys General, for Plaintiff and Respondent.

Following a denial of his motion to suppress evidence, appellant entered pleas of nolo contendere to two counts each of receiving stolen property (Pen. Code, § 496), and grand theft (Pen. Code, § 487, subd. 1). Upon the People's motion, the trial court ordered the remaining eight counts dismissed in the furtherance of justice and placed appellant on probation for three years on the condition, among others, that he spend the first 280 days in the county jail.

Appellant appeals, challenging (1) the trial court's ruling on the suppression motion (appellant claims that the court's action was an impermissible "reconsideration of its earlier ruling"); and (2) the constitutionality of Vehicle Code section 2805, which permits a member of a city police department or county sheriff's office to conduct a warrantless inspection of a vehicle at an automobile repair shop or

dismantler lot, or any similar establishment, for the purpose of locating stolen vehicles. We affirm.

DISCUSSION:

1. *Trial Court's Ruling on Suppression Motion.*

Appellant contends the superior court, having once granted his suppression motion, was without jurisdiction to "reconsider" it prior to trial. A summary of the relevant procedural background follows:

March 9, 1979 Superior court takes suppression motion under submission

March 14, 1979 Court grants People's motion to reopen hearing on suppression motion to explain ambiguity in preliminary hearing record, and continues matter to March 16

March 16, 1979 Court grants suppression motion on the ground that Vehicle Code section 2805, as applied to this case, is unconstitutional, but court continues the hearing to March 29, 1979 to rule on the issue of consent

March 29, 1979 Court, on its own motion, reconsiders the earlier granting of the suppression motion, on the one ground, and denies the motion in its entirety

A court of law has certain inherent powers. Among them is that power or jurisdiction "to amend and control its processes and orders so as to make them conformable to law and justice." (Calif. Code of Civ. Proc. § 128; 1 Witkin, Calif. Procedure (2d ed.) Courts, § 116, p. 385, § 121, p. 390.) It follows that unless otherwise clearly limited by statute in a particular proceeding, a court's rulings on mo-

tions are not irrevocably cast in concrete and a decision on a motion is not ordinarily res judicata. (4 Witkin, Procedures, (2d ed.) Proceedings without Trial, § 27, p. 2695.) In civil cases a court has statutory power to prevent vexacious renewals of a motion made and denied; but even there, the statute (Calif. Code of Civ. Proc. § 1008) does not deprive a court of jurisdiction to entertain a "second" motion. (4 Witkin, Calif. Procedure (2d ed.) Proceedings without Trial, § 28, p. 2696.) But more importantly, Calif. Code of Civil Procedure section 1008 recognizes the availability of, and sets forth the requirements for renewal of a motion "on a different state of facts."

In the field of criminal law, California Penal Code section 1538.5 prescribes the procedure by which motions to return property or suppress evidence shall be made. But nowhere in that section has the court's inherent power, described above, been removed.

Madril v. Superior Court (1975) 15 Cal.3d 73, 77-78 holds that once a superior court has finally ruled on a suppression motion under Penal Code section 1538.5, that court no longer has jurisdiction to reconsider the matter before trial. The *Madril* holding applies when a full hearing has been had on the suppression motion in the superior court. *Madril,* however, does not prevent a court from announcing one ground on which to suppress evidence but continuing the hearing for and then considering an alternate ground contemporaneously advanced in further support of or in opposition to such suppression. In such a situation, the hearing is not a relitigation of the original motion. (*People v. Brooks* (1980) 26 Cal.3d 471, 480-481.) Such is the case here.

After granting appellant's suppression motion on the ground of the unconstitutionality of Vehicle Code section 2805, the superior court nonetheless specifically stated that

"there are other factors involved, such as consent, which would affect the motion," that the court was "not prepared right at this point to rule on the question of consent," and would continue the hearing to determine the consent issue. Thus, when the court granted the suppression motion on the basis of the statute's unconstitutionality, such grant was tentative; it still had to consider the distinctly different issue of appellant's consent. As no full hearing had yet been had at the time of the court's initial and tentative ruling, the court had jurisdiction to thereafter consider the remaining issue of consent and in the light thereof to reconsider its earlier ruling.[1] (*People v. Brooks, supra*, 26 Cal.3d 471, 481.)

2. *Constitutionality of Vehicle Code Section 2805.*

Appellant argues that Vehicle Code section 2805 is unconstitutional because it authorizes an inspection of certain business premises without a search warrant. That section provides in pertinent part that a member of the California Highway Patrol, or a member of the City Police Department or County Sheriff's Office "may inspect any vehicle of a type required to be registered under this code on a highway or in any public garage, repair shop, parking lot, new or used car lot, automobile dismantler's lot, vehicle shredding facility, vehicle leasing or rental lot, vehicle equipment rental yard, vehicle salvage pool, or other similar establishment, and may inspect the title or registration of vehicles, in order to establish the rightful ownership or possession of the vehicle." California cases have construed Vehicle Code section 2805 as authorizing a warrantless search "under reasonable circumstances" for the purpose

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[1]The court made no ruling on the issue of consent, having determined that the inspection was proper under Vehicle Code section 2805.

of investigating a vehicle's title or registration. (*People v. Burnett* (1980) 107 Cal.App.3d 795, 800; *Jackson v. Superior Court* (1977) 74 Cal.App.3d 361, 367.) Here, the facts leading to the warrantless search of appellant's business premises are as follows:

Investigator Robin Ririe of the Los Angeles Police Department, assigned to the Burglary-Auto Theft Section, received information from Sergeant Biller of the Hollywood Division regarding numerous cars which would go to Daytona Auto Body (appellant's business) in undamaged condition and were never seen to leave the premises. Later, while investigating an individual named Ernest Stradmann, Investigator Ririe came across the name of one Sol Misrahri, who was involved with Culver City Auto Dismantlers. Upon contacting that business, its owner Lou Chess told Investigator Ririe that Mizrahri used to have his cars painted at Culver City Auto Dismantlers but that he (Chess) had told Mizrahri to take his business elsewhere because the cars appeared to be of questionable origin, and that Mizrahri was now using Daytona Auto Body. Thereafter, on July 26, 1978, Investigator Ririe received information from Investigator Johnson regarding incidents of insurance fraud involving Daytona Auto Body.

Based on the totality of information available to him, Investigator Ririe formed the opinion that "they were dealing in stolen and switched cars at Daytona Auto Body Shop." On July 27, 1978, Investigator Ririe, at about 10:00 a.m., paid a visit to the Daytona Body Shop. There he spoke with appellant, identified himself as a policeman, and explained he was there to conduct a business inspection pursuant to Vehicle Code section 2805. Appellant replied, "There is no problem here. My business is open." When Investigator Ririe asked if he could see some of the paperwork on the vehicles in the shop, appellant said, "Sure,

right here in my office." After looking through some of the paperwork, Investigator Ririe and two or three other investigators, who by then had also arrived there, inspected the premises.

Ten minutes later, Investigator Mark Ford arrived. Like Investigator Ririe, Investigator Ford was assigned to the Burglary-Auto Theft Division. In court, Investigator Ford described appellant's business premises as "a storage or [sic] parts for dismantled vehicles." At the time there were 30-35 vehicles at the premises. In inspecting the VIN number on a freshly painted Porsche automobile in the painting area, Investigator Ford concluded that the vehicle had been stolen. On another freshly painted Porsche, the Investigator observed that the identification number had been changed, that the transmission number had been ground off, and that the engine did not belong to that particular vehicle. Next to the paint booth, a Porsche engine was lying on the floor. Also on the premises was the shell of a Porsche, whose identification number matched that of the second freshly painted Porsche. A subsequent "wants" check ran by Investigator Ford revealed the true owners of the vehicles.

Certainly, the totality of information available to Investigator Ririe prior to the inspection "raised the probability" that Daytona Auto Body was engaged in the business of stolen cars. (*People v. Grubb* (1965) 63 Cal.2d 614, 618.)

As to appellant's contention that Vehicle Code section 2805 is unconstitutional because it authorizes "carte-blanche" searches of business premises, California courts have upheld its validity on the ground that, properly construed, the section applies to searches made "under reasonable circumstances, within constitutional limitations." (*People v. Burnett, supra,* 107 Cal.App.3d 795, 800; *Jackson v. Superior Court, supra,* 74 Cal.App.3d 361, 367.) We conclude that

in this case the inspection was made under reasonable circumstances, within constitutional limitations.

Furthermore, Vehicle Code section 320 subjects auto dismantlers (defined by Vehicle Code section 220 as those who sell or deal in used motor vehicle parts) to warrantless inspections during normal business hours of vehicles and records at the premises. As the court in *People v. Woolsey* (1979) 90 Cal.App.3d 994, 1003 stated: "Quite obviously, regulation by city and state government over automobile dismantlers is part of the continued effort by law enforcement to eliminate theft of cars and the profit associated with that illegal activity. The elaborate provisions for registration and licensing of businesses engaged in dismantling vehicles or selling used vehicles was 'designed to segregate the honest business man from the thief and the fence. . . . [A] state may impose on the licensing of a business, so fraught with public danger, a requirement that its premises be open to orderly inspections.' " [Citation.] The evidence indicates that appellant was in fact engaged in the auto dismantling business. In *Woolsey, supra,* the defendant, like appellant in this case, was not a licensed auto dismantler, yet the court applied Vehicle Code section 320 to him.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

/s/ Beach, J.
BEACH

We concur:

/s/ Fleming, Acting P. J.
FLEMING

/s/ Compton, J.
COMPTON

APPENDIX B.

Order Denying Hearing.

After Judgment by the Court of Appeal, 2nd District, Division 2, Crim. No. 37347.

In the Supreme Court of the State of California, In Bank.

People v. Gilbert Frank Lopez.

Caldecott, J., sitting under assignment by the Chairperson of the Judicial Council.

Filed: May 8, 1981.

Appellant's petition for hearing DENIED.

Bird, C.J., and Mosk, J., are of the opinion that the petition should be granted.

/s/ Bird, Chief Justice.